

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKET SECTION

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QA-7720

OST-96-1116-2

Joint Application of

UNITED AIR LINES, INC.

and

DEUTSCHE LUFTHANSA, A.G.
(LUFTHANSA GERMAN AIRLINES)

under 49 U.S.C. 41308 and 41309 for
approval of and antitrust immunity for
an expanded alliance agreement

Docket OST 96-1116

MOTION OF UNITED AIR LINES, INC.
FOR CONFIDENTIAL TREATMENT UNDER
RULE 39 OF THE DEPARTMENT'S RULES OF PRACTICE
AND UNDER 49 U.S.C. SECTION 40115

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DATED: February 29, 1996

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Pursuant to Rule 39 of the Department's Rules of Practice, United Air Lines, Inc. ("United") hereby moves to withhold from public disclosure certain proprietary and commercially sensitive data pursuant to 14 C.F.R. Section 302.39 ("Rule 39") and 49 U.S.C. Section 40115 [formerly section 1104 of the Federal Aviation Act of 1958, as amended]. This information is being submitted by United in connection with its application for approval of and antitrust immunity for its Alliance Expansion Agreement with Lufthansa German Airlines. United has submitted five (5) copies of this material, under seal, to the Docket Section of the Department. Due to the competitively sensitive nature of these materials, United requests that access to these documents be limited to counsel and outside experts for interested parties. In support of this motion, United states as follows:

1. The documents for which United is seeking confidential treatment consist of competitively sensitive commercial information which is protected from public disclosure under exemptions 3 and 4 of the Freedom of Information Act, 5 U.S.C. §§ 552(b) (3), (4). These materials consist of corporate documents dated within the last two years that address competition in the U.S.-Germany market, as well as studies, surveys, analyses and reports within that time frame, prepared by or for corporate officers or directors of United, which evaluate or analyze the proposed expansion of United's Alliance with Lufthansa German Airlines with respect to market shares, competition, competitors, markets, potential for traffic growth or expansion into geographic markets. These materials correspond to items that the Department requested Delta Air Lines, Inc. ("Delta") et al., to file in Docket OST-95-618 in Informational Items 1 and 2.

2. The test for withholding of information under exemption 4 is "an objective one"^{1/} which protects from disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529 (D.C.Cir. 1979) (citations omitted). Whether information is privileged or confidential, in turn, depends on whether disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to

^{1/} Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C.Cir. 1982) (citing National Parks & Conservation Association v. Morton, 498 F.2d 765, 766 (D.C.Cir. 1974)).

cause substantial harm to the competitive position of the person from whom the information was obtained."^{2/}

All of the documents submitted herein are commercial or financial in nature, in that they contain commercially sensitive, proprietary and privileged information relating to United's commercial and financial operations. Moreover, the documents have been obtained from a person within the meaning of exemption (4).

Finally, the documents submitted pursuant to this Motion are privileged and confidential. United has not publicly released the documents for which it now files this Motion. The likelihood of harm arising from such disclosure is apparent, since competitors would gain valuable insights into United's strategies and objectives regarding its operation of joint services with Lufthansa. This showing, by itself, demonstrates that the documents are privileged or confidential within the meaning of exemption (4).

3. A substantial portion of the documents submitted herein also qualify for withholding under exemption (3), which provides for nondisclosure of information specifically protected from disclosure by another statute. Such documents qualify for withholding under exemption (3) because their release would adversely affect United's competitive position in foreign air transportation, so that their release is proscribed by the requirements of 49 U.S.C. § 40115. The courts have recognized

^{2/} Washington Post Co., at 268.

that 49 U.S.C. § 40115 constitutes a withholding statute under exemption (3). See, e.g., British Airports Authority v. CAB, 531 F.Supp. 408, 414 (D.D.C. 1982).


There can be no question that public disclosure of this information would adversely affect United's competitive position in foreign air transportation, since it contains sensitive commercial information that could be used by United's competitors to frustrate its operational plans on a worldwide basis. Therefore, withholding under exemption (3) is required by the terms of 49 U.S.C. § 40115.

4. United also requests that the Department limit access to these documents to counsel and outside experts of interested parties who have submitted affidavits stating that the information will be used only for purposes of this proceeding and will not be disclosed to anyone other than counsel or outside experts who have filed a similar affidavit.

The documents at issue contain highly sensitive commercial information, and include corporate documents, studies and analyses prepared for the purposes of international planning and strategic decision-making. None of the information has been publicly released, and much of it has not been shared between the Joint Applicants themselves. Release of the documents would cause substantial harm to the operations of United, as was demonstrated above. Moreover, the Department has previously recognized the likelihood of serious harm in similar circumstances, as when it instituted affidavit procedures for the confidential materials submitted in Docket OST-95-618

(Application of Delta, et al., for antitrust immunity). Order 95-11-5. See also Order 96-1-6, at 3. The information submitted herein is of a similar nature -- and even its limited release would be similarly damaging -- to the materials submitted by the Joint Applicants in that docket. In these circumstances, United requests that all documents submitted herein be protected from disclosure under Rule 39 of the Department's Rules of Practice, and furthermore that the Department institute its confidential affidavit procedures to limit disclosure of the documents to counsel and outside experts of interested parties in this proceeding.

Respectfully submitted,



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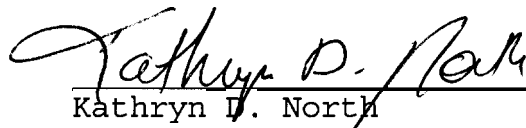
Counsel for
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DATED: February 29, 1996

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion of United Air Lines, Inc. For Confidential Treatment Under Rule 39 of the Department's Rules of Practice and Under 49 U.S.C. Section 40115 on all persons named on the attached service list by causing a copy to be sent via first class mail, postage prepaid.


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DATED: February 29, 1996

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